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December 8, 2004

VIA ELECTRONIC FILING (ECFS)

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: ***Ex Parte,*** WC Docket No. 04-313, CC Docket Nos. 01-338

Dear Ms. Dortch:

In this letter, Commenters[1] urge the Commission to protect competitive access to DS1 UNE loops by taking the following actions:

- Make a national and conclusive finding that CLECs are impaired without unbundled access to DS1 loops. As explained below, substantial evidence supports such a decision.

- Find that the only limiting standard appropriate to such an impairment determination would be one similar to that used in the *Triennial Review Order*, requiring unbundling of DS1 loop facilities *unless* two (2) or more wholesale alternatives are available from a given loop user location.

- Conclude that there should be no self-provisioning trigger for DS1 loops because the evidence does not justify one, as the Commission found in the *Triennial Review Order*.

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[1] Commenters are ATX Communications, Inc.; Freedom Ring Communications, L.L.C. d/b/a Bay-Ring Communications; CTC Communications Corp.; Focal Communications Corporation; Globalcom, Inc.; Mpower Communications Corp.; Ntelos, Inc.; RCN Telecom Services, Inc.; and TDS Metrocom, LLC.

There is Substantial Evidence for a National Impairment Finding for DS1 Loops

The Commission has before it overwhelming record evidence supporting a national and conclusive factual finding that CLECs are impaired without unbundled access to DS1 loops.[2] Because of this, it has the "substantial evidence" it needs to adopt such a decision.[3] Significantly, the test for determining if a factual finding is supported by substantial evidence is "highly deferential" and is based on whether a "'reasonable mind might accept [such evidence] as adequate to support a conclusion.'"[4] In this case, despite RBOC arguments to the contrary (which CLECs have disproved),[5] the evidence compels a reasonable analysis to find that CLECs are impaired without unbundled access to DS1 loops.

By the same token, Commenters recognize that "*USTA I* indicated that the Commission should not establish very broad national categories where there is evidence that markets vary decisively (by reference to its impairment criteria), at least not without exploring the possibility of more nuanced alternatives and reasonably rejecting them."[6] However, the record shows that markets do not "vary decisively" with respect to DS1 loop facilities. Notably, when *USTA II* overturned the Commission's national finding of impairment with respect to mass market switching, the D.C Circuit identified compelling evidence that "indicated the presence of many markets where CLECs suffered no impairment in the absence of unbundling [of switching]...."[7] In contrast, abundant evidence demonstrates that CLECs will suffer impairment in all markets without DS1 loop unbundling, because standalone DS1 capacity facilities are rarely self-deployed or offered from alternative providers on a wholesale basis.

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[2] *See, e.g.,* Commenter's Comments at 11-19, 21 and supporting declarations; Commenters' Reply Comments at 44-46; XO Communications Inc.'s Emergency Petition for Expedited Determination that Competitive Local Exchange Carriers are Impaired without DS1 UNE Loops, WC Docket No. 04-313, CC Docket No. 01-338, at 25-37 and supporting declarations (filed Sep. 29, 2004); *see also* Letter from Comptel/ASCENT *et al.* to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket Nos. 01-338, 96-98, and 98-147, at 2-3 (filed Oct. 4, 2004); Letter from Comptel/ASCENT *et al.* to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket Nos. 01-338 (filed Nov. 2, 2004); AT&T Comments at 32-42, 52-65 and supporting declarations; AT&T Reply Comments at 49-57 and supporting declarations; Initial Comments of the Loops and Transport Coalition at 92-113 and supporting declarations.

[3] *Damsky v. F.C.C.*, 199 F.3d 527, 533-34 (D.C. Cir. 2000) (explaining that the court "review[s] the FCC's factual findings for support by substantial evidence") ; *see also AT&T v. F.C.C.*, 86 F.3d 242, 247 (D.C. Cir. 1996).

[4] *AT&T*, 86 F.3d at 247 (citing *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)).

[5] *See supra* n.2. "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Id.* 86 F.3d at 247 (quoting *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951)).

[6] *United Stated Telecom Association v. FCC*, 359 F.3d 554, 570 (D.C. Cir 2004) ("*USTA II*") (citing *United States Telecom Association v. FCC*, 290 F.3d 414, 425-26 (D.C. Cir. 2002) ("*USTA I*")).

[7] *USTA II*, 359 F.3d at 587.

At Most, Unbundled DS1 Loops Should Not Be Available Where the DS1 Wholesale Trigger Established in the *Triennial Review Order* is Satisfied

Notwithstanding the above, to the extent that the Commission elects to apply some limiting standard or a "safety valve"[8] to a national impairment determination for DS1 loops, it should, as explained below, take an approach that is similar to what it took in the *Triennial Review Order*.[9]

First, it should apply a wholesale non-impairment trigger for DS1 loops that is akin to the location-specific trigger it adopted in the *Triennial Review Order,* which requires two (2) or more competing wholesale providers for a non-impairment finding. The Commission should not implement a one (1) wholesaler trigger because, as the *Triennial Review Order* found, doing so runs "the risk of failing to accommodate unusual circumstances unique to a single provider that may not reflect the ability of other competitors to similarly deploy."[10]

Second, as explained later, the Commission should *not* apply a self-provisioning trigger for DS1 loops because the record evidence unequivocally proves, as it did in the *Triennial Review Order*, that self-deployment at this limited capacity level is not economically justified.

Third, the Commission should require that ILECs make DS1 loop facilities available on an unbundled basis until the Commission (or its staff on delegated authority) finds that the DS1 trigger has been satisfied at a particular loop user location. Doing so is justified because, as explained above, substantial evidence demonstrates that CLECs are almost always impaired without unbundled access to these UNEs. Furthermore, having ILECs offer DS1 loops while the application of the triggers is pending is crucial to the health and long term viability of competitive DS1 market. Indeed, if the Commission did otherwise and permitted ILECs to deny CLECs access to DS1 loops before determinations on the triggers are made, the numerous competitive providers whose business plans rely solely on the availability of DS1 loops would be irreparably harmed.

Fourth, before making a determination as to whether the trigger has been satisfied at a particular location, the Commission should require that the competing providers identified as providing wholesale DS1 loops *verify that they do in fact offer wholesale services at that location*. This is necessary because evidence in the record demonstrates that many of the competitive

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[8] *USTA II*, 359 F.3d at 571.

[9] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003), corrected by Errata, 18 FCC Rcd 19020 (2003) ("*TRO*" or "*Triennial Review Order*").

[10] *TRO*, nn. 974, 976.

wholesale providers identified by RBOCs as satisfying this trigger do not offer wholesale services or do not offer wholesale services at certain locations.[11] The competing wholesale providers should also verify that they are: operationally ready and willing to offer their DS1 loops on a widely available common carrier basis; offering reasonable access to their cross connects; and have access to and can provide DS1 facilities to the customers located in the entire location in question.[12] If these companies are indeed ready and willing to offer wholesale service, they should have every incentive to verify that fact. In addition, the Commission should have proof that such wholesalers are unaffiliated with the ILEC.

Fifth, to the extent that dark fiber UNEs are no longer available at a particular location or on a given transport route, the Commission should clarify that the DS1 wholesale loop trigger is not deemed satisfied at those locations if a competing provider is offering DS1 wholesale services over such dark fiber UNE loops. This clarification is warranted because, when the wholesale provider loses access to the dark fiber UNE loop, it will no longer be able to provision its wholesale DS1 loop offering. In addition, to avoid double counting and potential gaming under such a DS1 wholesale trigger, the Commission should have confirmation from the competing wholesale provider that it owns the facilities upon which it offers wholesale services.

A Self-Provisioning Trigger Should Not Be Applied to DS1 Loops

For virtually the same reasons the Commission did not apply the loop self-provisioning trigger to DS1s in the *Triennial Review Order*, the Commission should not apply a trigger to DS1 loops at this time. In the *TRO,* the Commission found that because "there is little record evidence demonstrating that carriers construct facilities exclusively at the DS1 level, as well as lack of economic evidence showing such self-deployment is possible, the Self-Provisioning Trigger will not be applied to DS1 loops."[13] Substantial evidence in the record shows that this continues to be true.[14]

Notably, BellSouth's recent *ex partes* are misleading in suggesting that CLECs are now constructing DS1 loop facilities.[15] What BellSouth fails to explain is that this rarely occurs and that CLECs have self-provisioned DS1 capacity loops in a certain geographic area or location *only* where the CLEC has already self-provisioned fiber loop facilities at higher capacity levels

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[11] *See* Commenters' Comments at 38-42; QSI Report at 13.

[12] *See* Commenters' Comments at 38-42.

[13] *TRO*, ¶ 334.

[14] *See, e.g.,* supra n.2.

[15] *See* Letter from Bennett L. Ross, General Counsel-D.C, BellSouth D.C. Inc., to Marlene H Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338, at 1-2 (filed Nov. 17, 2004); Letter from Glean T. Reynolds, Vice President-Federal Regulatory, BellSouth, to Marlene Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338, Attachment at 13 (filed Nov. 19, 2004).

to serve clusters of tightly grouped customers.[16] Outside of these unusual and exceptional circumstances, large and small CLECs alike unanimously and wholeheartedly agree that it is uneconomic to construct stand-alone DS1 facilities.[17] Relatedly, in the *Triennial Review Order*, the Commission found that similar self-deployment evidence "does not support the ability to self-deploy stand-alone DS1 capacity loops nor does it impact our impairment finding."[18]

The Commission should uphold this sound decision and not depart from it. The D.C. Circuit has held that "an agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reason for doing so. 'Indeed, where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.'"[19] As the Supreme Court has put it, "an agency changing its course must supply a reasoned analysis...."[20] In this instance, the evidence is virtually identical to the evidence before the Commission in the *Triennial Review Order*. Because of this, it would be both irrational[21] and unreasonable for the Commission to deviate from its prior decision and apply a self-provisioning trigger to DS1 loops. Significantly, any professed fears that such a decision may not survive D.C. Circuit review are unfounded. This is so because when the D.C. Circuit vacated and remanded various aspects of the *Triennial Review Order, it did not overturn the Commission's decision not to apply the self-provisioning trigger to DS1 loops.* Moreover, there is no "clear error" in rendering this decision.[22]

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[16] *See* Letter from Eric Branfman, Swidler Berlin Shereff Friedman, LLP, Counsel for BayRing, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 (Dec. 2, 2004) ("BayRing Dec. 2, 2004 *Ex Parte* Letter").

[17] *See, e.g.,*Declaration of Wil Tirado, XO ¶ 21 (explaining that "it almost never is economic for XO to construct its own wireline DS-1 loop facilities"); Declaration of D'Apolito-Stanley, AT&T ¶¶ 20-22 (explaining that it is virtually always uneconomical for AT&T to build loop facilities unless it has more than 2 DS3s of total demand); Declaration of Wengert, BayRing ¶ 10; Declaration of Jenn, TDS ¶ 10-11; Declaration of Johnson, OneEighty, ¶¶ 5 & 7.

[18] *TRO*, n. 957.

[19] *Wisconsin Valley Improvement v. F.E.R.C.,* 236 F.3d 738 (D.C. Cir. 2001) (quoting ANR Pipeline Co. v. FERC, 71 F.3d 897, 901 (D.C.Cir.1995)); *see also AT&T v. FCC,* 974 F.2d 1351, 1355 (D.C.Cir.1992) (faulting the FCC for failing to explain why it "changed the original price cap rules" and concluding that the Commission's "Reconsideration Order is arbitrary and capricious for want of an adequate explanation").

[20] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 57 (1983) (citation omitted).

[21] *USTA II* at 571 (explaining that "a rule is irrational if a party has presented to the agency a narrower alternative that has all the same advantages and fewer disadvantages, and the agency has not articulated any reasonable explanation for rejecting the proposed alternative").

[22] *See AT&T Corp. v. F.C.C.,* 220 F.3d 607, 616 (D.C. Cir. 2000) (citation omitted) (noting that "We may reverse only if the agency's decision is not supported by substantial evidence, or that the agency made a clear error in judgment").

Because long-standing precedent requires a reviewing court to afford heightened deference to a Commission decision that is supported by substantial evidence, the Commission should stand firm and not disturb its prior conclusion. As discussed above, to the extent the Commission wishes to apply any DS1 non-impairment loop trigger, it should only be the DS1 loop wholesale trigger because this safety valve is "narrowly-tailored"[23] and need not be any larger than what, if anything, the facts, support applying. Apart from that, expanding the safety valve to include a self-provisioning trigger for DS1 loops would foist significant and entirely unnecessary administrative burdens and costs on the Commission and the industry.

Sincerely,

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TDS Metrocom, LLC

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[23] *See USTA II*, at 570-571.